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NO. 80-

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD SULLIVAN,

Petitioner,

-AGAINST-

PERINI NORTH RIVER ASSOCIATES AND HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a construction worker whose principal duties are performed on actual navigable water in the construction of a sewage control project to eliminate pollution of a navigable river and who sustains on such waters a work related injury, is a person engaged in maritime employment within the meaning of §902(3) of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C. §901 et seq.

2. Whether the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act withdrew coverage for construction workers whose principal duties are performed on actual navigable waters and deprived them of the benefits which they would have had under the 1927 Act.

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IN THE

SUPREME COURT OF THE UNITED STATES

BERNARD SULLIVAN,

Petitioner,

-against-

PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT and INDEMNITY CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Bernard Sullivan,* respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of

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* In addition to the parties listed in the caption, the Director, Office of Workers' Compensation Programs, United States Department of Labor and Ronald Fusco participated in the case and were petitioners in the United States Court of Appeals for the Second Circuit.

Appeals for the Second Circuit entered on June 4, 1980 denying coverage of his claim under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (1970 ed. Supp. V 1975). That decision entered on remand from the Supreme Court of the United States reversed the opinion and judgment of the Second Circuit Court of Appeals entered on June 29, 1979 which held that petitioner was a person engaged in maritime employment and covered under the Act.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix, hereinafter "App.", A) is dated June 4, 1980 and reported at 622 F. 2d 1111. A timely Petition for Rehearing and Rehearing En Banc was denied by Order dated August 19, 1980 (App. B). The Order of the United States Supreme Court dated January 14, 1980 at 100 S. Ct. 697, 48 L.W. 3451 (App. C). The Opinion of the Court of Appeals is dated June 29, 1979 and reported 601 F. 2d 659 (App. D). The Petition for Re-

hearing and Rehearing En Banc was denied by Order dated August 21, 1979 (App. E). The decision of the Benefits Review Board of the Department of Labor and dissenting opinion of Member Miller dated November 30, 1978 and January 19, 1979, respectively (App. F) is reported at 9 BRBS 378.* The Administrative Law Judge decision in the case of Ronald Fusco was filed on December 28, 1977 (App. G). The Administrative Law Judge decision in the case of Bernard Sullivan was filed on August 26, 1977 (App. H).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 4, 1980. On August 19, 1980, the Second Circuit denied Petitioner, Bernard

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* The Benefits Review Board Service (BRBS) is the unofficial reporter of the Board's decisions.

Sullivan's timely Petition for Rehearing and Rehearing En Banc.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 902(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §902(3) (1970 ed. & Supp. V is set forth as Appendix I).

STATEMENT OF THE CASE

Petitioner, Bernard Sullivan sustained a work related injury while employed by Perini North River Associates on the site of the North River Pollution Control Project. He filed a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, as

amended 86 Stat. 1251, 33 U.S.C. §901, et seq. (1970 ed., Supp. V). Perini controverted the claim on the issue of coverage and the claim was referred to the Office of Administrative Law Judges for a formal hearing.

The Administrative Law Judge after conducting a formal hearing rejected the claim on the ground that Sullivan was not covered under the Act. Bernard Sullivan v. Perini North River Associates, Case No. 77-LHCA-85 (A96).

Sullivan took an appeal to the Benefits Review Board. The Board consolidated his claim with three other claims arising out of the North River Pollution Control Project for the purpose of review since they involved common questions of law and fact. The Board (Member Miller dissenting) in a decision dated November 30, 1978 affirmed the

Administrative Law Judge decision and held that Sullivan was not engaged in maritime employment within the meaning of §902(3) of the Act, 33 U.S.C. §902(3) and not covered under the Act. (A36).

Sullivan then filed a Petition for review of the Board's decision in the United States Court of Appeals for the Second Circuit. Another employee, Ronald Fusco and the Director, Office of Workers' Compensation Programs also filed petitions in the Second Circuit for review of the Board's decision contending that the Benefits Review Board erred as a matter of law in determining that these claimants were not covered by the Act.

The Second Circuit reversed the decision of the Benefits Review Board and granted the petitions of Sullivan and Fusco. In it's decision dated June 29, 1979 the Court stated:

> Weighing all relevant factors, we interpet the phrase "person engaged in maritime employment" geographically so as to include any person whose principal duties are performed on navigable waters as that term was understood before 1972. In this case we have no occasion to decide whether the critical phrase also includes a person whose principal duties are on land but who suffers work-related injuries while performing duties upon navigable waters. Fusco v. Perini North River Associates, 601 F. 2d 659 at 669 (2nd Cir. 1979) (A29).

Concluding that the purpose of Congress in amending the Longshoremen's Act was to extend and not to withdraw eligibility, the Court held that since Sullivan performed his principal duties upon navigable waters as that term was defined in §3(a) of the original 1927 Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U.S.C. §903(a) and sustained on such waters a work-related injury, he was engaged in

maritime employment within the meaning of §902(3) of the Act, as amended in 1972. 601 F. 2d at 669 (A30).

Perini North River Associates and Hartford Accident and Indemnity Company then filed a petition to the Second Circuit Court of Appeals requesting rehearing and rehearing en banc. The petition was denied on August 21, 1979. 601 F. 2d 659 at 670 (A32).

Perini North River Associates and Hartford Accident and Indemnity Company then filed a Petition for a Writ of Certiorari in the Supreme Court of the United States to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated June 29, 1979. In granting the petition for a writ of certiorari, the Supreme Court vacated the judgment and remanded the case to the Second Circuit for fur-

ther consideration in light of P. C. Pfeiffer Co. v. Ford, 444 U.S. ___, 100 S. Ct. 328 (Nov. 27, 1979). Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun dissenting. Perini North River Associates v. Fusco, Sup. Ct. of U.S. Oct. Term 1979, No. 79-759, 48 L. W. 3451, 100 S. Ct. 697 (A8).

The United States Court of Appeals for the Second Circuit on remand from the Supreme Court of the United States issued an opinion on June 4, 1980 denying the petition of Bernard Sullivan. In reversing their original opinion which had held that Sullivan was a covered employee under the Act, the Court now held that although the principal duties of Sullivan were performed on navigable water in the construction of the substructure extending over the water for a project to eliminate pollution of

navigable waters, he was not a person engaged in maritime employment or a harborworker within the meaning of §902(3) of the Act, as amended. Fusco v. Perini North River Associates, 622 F. 2d 1111 (2nd Cir. 1980) (A5).

After the Second Circuit opinion was issued, Bernard Sullivan filed a timely petition to the Second Circuit Court of Appeals requesting rehearing and rehearing en banc. The petition for rehearing and rehearing en banc was denied on August 19, 1980 (A7).

STATEMENT OF FACT

Bernard Sullivan worked for Perini North River Associates on the North River Pollution Control Project as a wire lather for 16 months before his injury on September 11, 1975.

Perini was constructing a

concrete substructure or foundation for a sewage treatment facility to be located on the Hudson River in the vicinity of West 138th Street, New York City. The substructure was to be built in the navigable waters and to extend approximately 500 feet into the Hudson River to the pier head and 2000 feet along the length of the river.

The facility had been contracted by the City of New York and was being constructed with federal funding contributed by the United States Environmental Protection Agency pursuant to the Federal Water Pollution Control Act (33 U.S.C.A. §1251 et. seq.). The Act authorized Congress to provide funds for the erection of such harbor facilities to eliminate pollution in the navigable waters.

Perini had contracted with the

City of New York for the construction of the substructure in the river. The sewage treatment facility was to be erected upon the substructure at a later date.

Perini's work consisted of driving caissons (or piles) into the river bed, filling the caissons with steel reinforcement rods and concrete and connecting the caissons by horizontal beams above the water. The final step was to pour a concrete slab over the caissons and beams.

Sullivan worked for 16 months on, in and over the river. His regular assigned duties consisted in building caissons out over the water in barges, dropping caissons into the river from barges, reinforcing concrete with steel and working on the beams which at high tide were submerged causing him to stand

in the water. Two or three times a week, he was assigned to unload cargo and steel from barges towed by tugboats. The unloading required him to tie up and moor the barges to caissons, board the barges, hook the cargo to cranes and stack the cargo at the places where it was to be used.

On the day of his injury, Sullivan was standing 12 inches above the water installing beams on caissons about 150 feet out in the river from shore. As he was helping to pass a 30 foot steel rod into a connecting beam to reinforce it, he sustained an injury to his back.

REASONS FOR GRANTING THE WRIT

1. The Second Circuits Conclusion Interpreting The Term "Maritime Employment" as Excluding Water Based Construction Workers

> Whose Principal Duties Are Performed On Actual Navigable Water Has Been Decided in A Way Which is Not in Accordance With P. C. Pfeiffer Co. v. Ford And Other Applicable Decisions of This Court.

The issue in P. C. Pfeiffer v. Ford, 444 U.S. ___, 100 S. Ct. 328 (1979) was whether two employees who worked in a covered shoreside situs were persons engaged in "maritime employment" within the meaning of §902(3) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 902(3)).

> The issue in this case thus becomes whether Ford and Bryant are the kind of land-based employees that Congress intended to encompass within the term "maritime employment." 100 S. Ct. at 337.

The Supreme Court was not presented with the question of coverage for water based employees whose regular work activities are over, on and in actual navigable water nor did it have to con-

sider whether workers who were covered under the pre-1972 Act remained covered after the 1972 Amendments to the Act.

Recognizing that "maritime employment" as used in §902(3) is not confined solely to longshoring operations, the Supreme Court noted:

> -----But the language of §2(3) provides that an employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. ..." 33 U.S.C. §902(3). The petitioner's argument supposes that the word "including" means "and" or "as well as." We understand the word "including" to indicate that "longshoring operations" comprise a part of the larger group of activities that make up "maritime employment." See Webster's New Collegiate Dictionary 581 (1973). 100 S. Ct. at 334, n.7.

Similarly, Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 involved two shoreside employees, not

workers who were regularly assigned to perform their duties on actual navigable water. The question of coverage for water based employment or the question of whether employees covered before the 1972 Amendments remained covered after was not considered. However, the Supreme Court was cognizant of both of these issues when it stated:

> As the definition of employees makes clear, the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations. It is, however, unnecessary in this case to look beyond these two subcategories.
>
> This case also does not involve the question whether Congress excluded people who would have been covered before the 1972 Amendments, that is, workers who are injured on navigable waters as previously defined. See Weyerhaeuser Co. v. Gilmore, 528 F. 2d 957 (CA9) cert. denied, 429 U.S. 868, 50 L Ed 2d 148, 97 S. Ct. 179 (1976). 432 U.S. at 265 n.25 (1977).

Construction workers performing their work on actual navigable water have been traditionally covered under the Longshoremen's and Harbor Workers' Compensation Act. Prior to the 1972 Amendments, numerous cases involving construction workers have been sustained as being within the Coverage of the Act. Among those found to be covered were a labor foreman who fell from a barge constructed to pour concrete into an underwater foundation, Travelers Insurance Co. v. Branham, 136 F. 2d 873 (4th Cir. 1943); a carpenter constructing a lighthouse foundation, Merrit-Chapman & Scott Corp. v. Bassett, 50 F. Supp. 488 (1943); a structural steel worker dismantling a bridge, Davis v. Department of Labor & Industries, 317 U.S. 249, 63 S. Ct. 225 (1942); employee engaged in construction of bridge piers, Hardaway

Contracting Co. v. O'Keeffe, 414 F. 2d 657 (1968); a pile driver, Dixon v. Oosting, 238 F. Supp. 25 (1965); a crane operator demolishing a bridge, Peter v. Arrien, 463 F. 2d 252 (1972).

Prior to the 1972 amendments, the Act covered all work related unjuries to employees sustained on navigable water excluding only a master or member of a crew of any vessel and any person engaged by the master to load or unload or repair any small vessel under eighteen tons net, 33 U.S.C. § 903(a), Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), 82 S. Ct. 1196. The Act extended its coverage to employees who were involved in construction on navigable water. All doubt as to coverage of construction workers injured on navigable water was removed by the case of Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969) and

the sole question in determining coverage under the Act was whether the worker was injured on navigable water.

Landward extension of the coverage of the Act by the 1972 Amendments was reactive to the unfairness of coverage as determined by the situs of the accident. Congress responded and expanded the physical boundaries of the Act's coverage in 1972 by amending §3(a), 33 U.S.C. §903(a). Evidently, this expansion landward would draw into coverage workers who were land based and not traditional maritime workers. The definition of employee in §2(3), 33 U.S.C. §902(3) was also amended to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repair, shipbuilder, and ship-breaker

----." This amended section failed to define "maritime employment" or "harbor-worker."

The expansion of navigable water brought a multitude of additional land based workers, who were not previously covered, within the situs coverage of the amended Act. In order to avoid covering every worker who found himself within the confines of these newly covered shoreside areas, Congress made it clear that only those engaged in maritime employment would be covered. The intended effect of the amended definition of §2(3) was to limit the employments to which the Act's coverage on shore would apply. The amended definition of employee in §2(3) accomplished such a result by creating a status test of eligibility, that is, engaged in maritime employment, for the

newly included shoreside areas. There is no evidence of any Congressional intent to narrow the class of workers that were eligible for benefits prior to 1972 and withdraw Coverage from them.

The legislative history of the 1972 Amendments to the Act supports the construction that Congress did not intend to exclude employees traditionally covered who were injured while regularly working on actual navigable water. The Senate report, S. Rep. No. 92-1125, 92nd Cong. 2nd Sess. at 16 (1972) demonstrates the Congressional intention:

> "Section 2(a) amends §2(3) of the Act to define an "employee" as any person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. It does not exclude other employees traditionally covered but retains that part of §2(3)

> which excludes from the definition of "employee" masters, crew members or persons engaged by the master to unload, load or repair vessels of less than 18 tons net." [Emphasis added].

The Congressional intent not to treat employees regularly assigned to work on and in actual navigable waters in the same manner as persons injured on the newly expanded shoreside areas is bolstered by the affirmative statement that the definition of an "employee" does not exclude other employees traditionally covered. The 1972 amendments of the Act were designed to expand the Act's coverage to protect and bring within its coverage additional workers and not to exclude workers regularly assigned to perform their duties on actual navigable water and who were traditionally covered prior to the amendments.

In Northeast Marine Terminal

Co. Inc. V. Caputo, the Supreme Court in the first paragraph of the decision stated:

> In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 33 USCS §§901 et seq. [33 USCS §§901 et seq.], in substantial part to "extend [the Act's] coverage to protect additional workers." S Rep No. 92-1125, p1 (1972) (hereinafter S Rep). 432 U.S. 249 at 251 (1977).

The Second Circuit in the original opinion dated June 29, 1979 recognized that Congress enacted the 1972 Amendments to the Act to protect additional workers. The Court analyzed the legislative history extensively in it's opinion, Fusco v. Perini North River Associates, 601 F. 2d 659 and concluded that Congress did not intend to exclude marine construction workers whose principal duties were performed on

navigable water.

On remand, the Second Circuit, despite cognizance of the legislative intent, denied coverage tc Sullivan, clearly a marine construction worker, thereby withdrawing coverage from employees whose principal duties are performed on navigable water. The effect of this determination is to withdraw coverage under the Amended Act from a class of workers who were traditionally covered before 1972. Conspicuously, in this opinion, the Court elides over the legislative history and the clearly expressed intent of Congress to broaden coverage to protect additional workers. The opinion is not harmonious with the intent explicitly expressed by the Supreme Court in P. C. Pfeiffer Company Inc v. Ford that "The Act now extends coverage to more workers ....," 100 S.

Ct. 328 at 332 and that the Act was amended to "extend [the Act's] coverage to protect additional workers" as stated in Northeast Marine Terminal v. Caputo, 432 U.S. 249 at 251.

The Second Circuit's interpretation of P. C. Pfeiffer v. Ford, supra, overlooks the issue with which the Supreme Court was confronted. Two land based employees who didnot work on actual navigable water were involved. The employer contended that the amended Act covered employees who worked or may be assigned to work over actual water. The Supreme Court rejected this geograpical test as being repugnant to the landward expansion of the Act and refused to restrict coverage for maritime employment to work performed on actual water. However, it does not follow from the Supreme Courts occupational approach

to land based employment that it would deny coverage to employment performed on actual water. To deny coverage to employees regularly assigned to work on navigable water would be to resurrect the "maritime but local" doctrine which was laid to rest by the Supreme Court in Calbeck v. Travelers Insurance Co. 370 U.S. 114 (1962).

Landbased employees are within the coverage of the Act because of the relationship between their work and some enterprise involving navigable water. Employees such as marine construction workers who work on, over and in actual water are distinguishable in that they are confronted with conditions that are maritime and do not require a nexus between what they do and an enterprise involving navigable water. They are directly involved in maritime employment

because their principal duties are performed on the water. Both the situs and status standards are met by the nature of their work which includes their use of barges, tugboats, rafts and other marine equipment. Their labor is expended on the water and they are exposed to the same risks and perils of the sea as experienced by other maritime workers. Unlike the landbased employees in P. C. Pfeiffer Company Inc. v. Ford, supra, the marine construction worker does not require an indirect connection with navigable water to bring him within the Act's coverage.

The phrase "maritime employment" as used in §2(3) does focus primarily on occupations, but not exclusively. This is illustrated by the fact that longshoremen are specifically included, as well as harbor workers; the former

group being classified by occupation and the latter by a geographical classification. The situs and status test are therefore related and significantly overlap each other. In certain cases both tests are met by proof of a single fact, that is, that an injured employee's regular duties are performed on actual navigable water. When the work being performed is on land, as in P. C. Pfeiffer v. Ford, supra, the overlap of the two tests disappears. The separate tests for situs and status become distinct. When a landbased employee is injured on a shoreside situs, only the occupational elements in the concept of maritime employment can bring him within the Act's coverage.

The question in P. C. Pfeiffer v. Ford, supra, was whether the coverage of the Act extended to certain landbased

employees. 100 S. Ct. 328 at 337. The Court did not consider coverage of employment on actual navigable water and did not address that subject. The Court considered Congressional intent with respect to the newly expanded shoreside coverage and concluded that there would coverage for shoreside employees whose work was occupationally maritime. The Court didnot consider the question of the Act's coverage of employment on actual water nor did it state that the Act excluded such employment from coverage.

In excluding marine construction workers and depriving this class of workers of benefits that they would have enjoyed prior to 1972, the Second Circuit's opinion is in conflict with the legislative intent of expanding coverage to protect additional workers. The issue of coverage for these employees

should be resolved by the Court.

2. Petitioner, Sullivan, a Construction Worker, Whose Principal Duties were Performed On, Over and In Actual Navigable Water in the Construction of a Water Pollution Control Project and Whose Regular assigned Duties Consisted of Mooring Barges, Unloading Cargo Barges, Hooking Cargo to Cranes on Barges and Stacking Cargo is a Person Engaged in "Maritime Employment" Within the Meaning of §902(3) of the Longshoremen's and Harbor Workers' Compensation Act as Amended.

Perini North River Associates, Petitioner's employer was engaged in the construction of a foundation for a sewage treatment facility which was to extend at least 500 feet from shore into the Hudson River. The facility was called the North River Pollution Control Project. The project had been contracted by the City of New York with financing

by the United States Enviromental Protection Agency. The Enviromental Protection Agency was created in 1970. Reorg. Plan No.3 of 1970, 3 CFR 1072 (1966-1970 Compilation), reprinted in 5 U.S.C. app., at 609 (1970) and in 84 Stat. 2086 (1970).

In 1972 Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816. These amendments together with the Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 (amending the 1972 amendments) established the methods for control of pollution in navigable waters by the Enviromental Protection Agency. They are set forth in Title 33, Navigation and Navigable Waters, of the United States Code Annotated, 33 U.S.C.A. §1251 et seq. (A104).

The purpose clearly expressed

in §1251(1)(2) of the Federal Water Pollution Control Act (A104) was to eliminate the discharge of pollutants into the navigable waters and to restore and maintain the chemical, physical and biological integrity of the Nation's waters for "the protection and propagation of fish, shellfish and wildlife and [provide] for recreation in and on the water." 33 U.S.C.A. §1251(1)(2). Construction of the North River Pollution Control Project directly resulted from these acts. Federal funds financed this project. The erection of this facility was to clean the Hudson River of pollution and this objective had a significant relationship to navigation and commerce. When completed, the effect upon the river from the operation of this facility could not have had a more obvious purpose than to augment and enhance the naviga-

tion of the river.

Irrespective of the fact that the facility being constructed had a maritime purpose, Sullivan was an employee injured on actual navigable water whose assigned work activities satisfied the status test of §902(3). 33 U.S.C. §902(3).

The substructure being erected was in actuality a concrete pier extending into the river and would alter the characteristics of the harbor. Sullivan's work was the type of job performed by a typical harborworker. However, the total of all of his assigned duties constituted maritime employment.

Section 902(3) which contains the "status" standard defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshor-

ing operations, and any harbor worker including a ship repairman, shipbuilder and shipbreaker....." 33 U.S.C. §902(3) [Emphasis added].

In P. C. Pfeiffer Company, Inc v. Ford, supra, the Supreme Court in defining the Act's occupational requirements stated that "The term "maritime employment" refers to the nature of a worker's activities. Thus §2(3) used the phrase "longshorem[e]n or other person[s] engaged in longshoring operations" as one example of workers who engaged in maritime employment no matter where they do their job." 444 U.S. ____", 100 S. Ct. 328 at p. 335.

Once again affirming that longshoring operations are only a part of a larger group of activities that are considered maritime employment, the Supreme Court stated:

> .... But the language of §2(3) provides that an employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker ...." 33 U.S.C. §902(3). The petitioner's argument supposes that the word "including" means "and" or "as well as." We understand the word "including" to indicate that "longshoring operations" comprise a part of the larger group of activities that make up "maritime employment." See Webster's New Collegiate Dictionary 581 (1973). 100 S. Ct 328 at p. 335 n.7.

Bernard Sullivan was employed in the construction of the foundation for the sewage treatment facility which extended at least 500 feet into the Hudson River to the pierhead. The employer utilized rotary drill barges, turn drill barges, tugboats and cargo type barges. The tugboats and barges brought supplies, steel and other cargo

to the site on the river.

Sullivan had worked continously for 16 months over, on and in actual water in the construction of the facility. Most of his period of employment was spent on the river working in actual navigable water. His assigned duties consisted of boarding barges to build caissons in the water, drilling caissons into the river bed and working on a barge dropping caissons into the river. Cargo type barges which carried construction material were towed to the site by tug-boats and moored to caissons in the river. One of Sullivan's duties was to assist in mooring the barges to the Caissons. Another of his assigned duties was to unload cargo, material and supp-lies from the barges, at least two or three times a week. In unloading the Cargo, he would board barges and use a

crane to unload steel. The cargo that was unloaded was then stacked by him on the pier or construction site.

The duties assigned to Sullivan by his employer to unload barges was the functional equivalent and identical with the tasks performed by longshoremen. If Sullivan or other similar employees did not unload the barges, longshoremen would have to be hired and such longshoremen would without question be covered under the Act as amended.

In addition to the continuous performance of his work on actual water which, in and of itself is uniquely maritime, his regular assigned duty of unloading barges was an indisputable longshoring operation. The equipment that he operated and his skills in unloading barges were similar to, if not identical with those used by longshore-

men, During his 16 months of employment on actual navigable water, he was exposed to the same risks and hazards as other maritime workers including longshoremen.

The 1972 amendments were designed to eliminate shifting coverage, that is to prevent the floating in and out of coverage by persons who move cargo from ship to land. Sullivan was assigned such work by his employer on a regular basis and if he is covered under the Act as amended for part of his activities, he would be covered for all.

The Supreme Court in P. C. Pfeiffer Company, Inc v. Ford, Supra, expressed this view as follows:

> "We believe that §2(3)'s explicit use of the terms "longshoreman" and "other person[s] engaged in longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally

> performed by longshoremen are within the purview of the 1972 Act. We do not suggest that the scope of maritime employment depends upon the vagaries of union jurisdiction. id, at 268, n.30, 97 S. Ct., at 2359, n.30. Instead, the crucial factor is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment. id, at 267, n.28, 97 S. Ct. at 2359, n. 28[17]. A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process ....." 100 S. Ct 328 at 337.

The Supreme Court in P. C. Pfeiffer Company Inc. v. Ford further stated:

> Congress was especially concerned that some workers might walk in and out of coverage. Out observation that Ford and Bryant were engaged in maritime employment at the time of their injuries does not undermine the holding of Northeast Marine Terminal v. Caputo, 432 U.S. at 273-274, 97 S. Ct.,

> at 2362-2363 that a worker is covered if he spends some of his time in indisputable longshoring operations and if, without the 1972 Act, he would be only partially covered. 100 S. Ct 238 at 337 n. 18.

Sullivan assigned duties of boarding barges and unloading cargo is identical with the work performed by longshoremen. He was an amphibious worker. These duties bring him within the purview of being an employee under §902(3) and within the Act's coverage.

The Second Circuit in Fusco v. Perini North River Associates, 622 F. 2d 1111 (1980) held that Sullivan, a water based marine construction worker was not engaged in maritime employment nor was he a harborworker within §902(3). As to the fact that he was not a harborworker, the Court reasoned that:

> To come within §2(3) a harborworker's activity must relate to ships, as is shown by the

> test of §2(3) which refers to a "harborworker including a shiprepairman, shipbuilder, and shipbreaker." 622 F. 2d at 1113.

This reasoning by the Court is dubious and should be reviewed. The Supreme Court in P. C. Pfeiffer Company Inc. v. Ford, supra, interpreted the word "including" in reference to longshoring operations to indicate that these operations comprise a part of the larger group of activities that make up maritime employment. Since the word "including" is used in §902(3) twice, once with reference to longshoring operations and secondly to harborworkers, it is reasonable to assume that it would have the same meaning, that is, that the word "harborworker" encompasses a larger group of activities of which shiprepairmen and shipbuilders are a part of.

The sewage treatment plant that

Sullivan was employed in constructing extended at least 500 feet into the river. It was not being built for scenic purposes. It's function was to clean the river and it had to be built there. There is no question that such a structure would alter the harbor of New York City and should, be considered a harbor facility. Sullivan's duties in connection with the erection of the substructure for this facility should constitute him as a harborworker.

The Second Circuit Court in deciding this case upon an occupational approach as dictated by P. C. Pfeiffer Company, Inc. v. Ford, supra, failed to consider that the situs and status tests required for maritime employment are related and under certain circumstances merge into one entity. This occurs when a worker's activities are water-based and his regular assigned duties are per-

formed on actual water. When the situs of the work moves on to land, the separate tests for situs and status separate and become distinct, and then only the worker's occupational activities can bring him within the status test required for maritime employment. Under the pre-amendment Act, all that was required for coverage was that the employee be injured on navigable water. It is difficult to perceive of a manner in which a water-based worker can have continuous and regular duties that are performed on actual water which are not maritime in nature.

In Odom Construction Company, Inc. v. United States Department of Labor, 622 F. 2d 110 decided on July 21, 1980, the United States Court of Appeals for the Fifth Circuit interpreting P. C. Pfeiffer Company, Inc. v. Ford, supra, held that a land based construction

worker who was engaged in a two-day job that required moving concrete blocks on the bank of a navigable canal was an employee engaged in maritime employment. At the time of his injury, he was standing on shore. The employer testified that 20% of his company's work involved bulkheading and piledriving and that he had a separate crew for that type of work. The Court in applying the Ford case stated:

> [1] First, the act of moving the blocks is maritime work. Section 902(3) lists harborworkers among the types of workers covered. It is at least arguable that the repair of moorings, even of those not adjacent to main docks, is a type of job that could be performed by a typical harborworker. Yet we need not hold that Maze was engaged in "harborworking" at the time of his injury, for §902(3) by its own terms states that longshoremen and harborworkers are not the only persons engaged in maritime employ-

> ment: Cf. P. C. Pfeiffer Co. v. Ford.... 622 F. 2d 110 at 112.
>
> .... Where as here, the claimant was doing maritime work that required him to go into the water and where a significant part of the employer's overall work, 20%, was maritime, the policy of the Act strongly favors coverage. 622 F. 2d at 113.

The Fifth Circuit Court discussing the 20% of the employer's workers who were involved in bulkheading and piledriving stated:

> Mr. Odom testified in the hearing before the ALJ that at the time of Maze's injury, approximately 20% of his company's work involved bulkheading and piledriving in navigable waters. He stated that he had a separate crew for that type of work and in fact had separately incorporated those operations before the hearing. If any member of this "maritime group" had been the claimant here, there would be no doubt about his status as a covered employee. 622 F. 2d at 113.

In the case at bar, 100% of the

work of Perini North River Associates consisted of driving caissons into the river bed and building a concrete pier on top of the caissons. Perini utilized tugboats, barges, drill barges and rafts and was more of a maritime employer than Odom Construction Company. Sullivan worked on actual navigable water, building and dropping caissons into the river and unloading barges for 16 months and his work was more of a maritime nature than Maze who was admittedly a landbased worker who only spent two days on the water.

The inequities in the Administration of the Act are glaringly patent and demonstrated in the case of Matson v. Perini North River Associates, BRB 78-563 decided by the Benefits Review Board on February 21, 1979, after the decision denying coverage to peti-

tioner Sullivan. Matson was employed as a dockbuilder by Perini, the same employer for whom Sullivan worked and on the same North River Pollution Control Project. Matson was involved in the Construction of a multi purpose pier which was located outside the foundation of the sewage treatment plant that Sullivan was working on. The pier was a part of the same complex and was to be used for the docking of barges to remove sludge from the sewage treatment plant. Matson's duties consisted in the driving of caissons, building forms, setting in the concrete slab and finishing the foundation.

The Administrative Law Judge denied coverage to Matson on the ground that he was not a harborworker. The Benefits Review reversed the decision and held that Matson was a harborworker

in the following statement:

> In Stewart v. Brown & Root Co., Inc., 7 BRBS 356, BRB No. 76-451 (Jan. 12 1978), the Board established a definition of the term "harbor-worker," as used in Section 2(3), to include "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which includes docks, piers, wharves and adjacent areas used in loading, unloading, repair or construction of ships)." Id. at 365. Herein, the record clearly establishes that claimant was engaged in the construction of a multi-purpose pier at which barges would be loaded. I therefore conclude that claimant satisfies the status test of Section 2(3) as a harbor worker. 3/ Moreover, claimant's employment further satisfies the Board's more recent test of maritime employment "that a claimant's employment must have a realistically significant relationship to maritime activities involving navigational commerce over navigable waters." Sedmak v. Perini North River Associates, 9 BRBS 378, BRB No. 77-B96 (Nov. 30, 1978) (Miller, Member, dissenting).

In the case at bar, Petitioner Sullivan was performing almost the identical duties performed by Matson on the same project for the same employer. The only difference was that Sullivan was working on the foundation for the sewage treatment plant while Matson was constructing the pier foundation which was to be used to dock barges to remove sludge from the plant. The sewage treatment plant was a necessary structure for the dock pier and one would be useless without the other. The Benefits Review Board held that the pier for the docking of barges was a harbor facility. Since both the sewage treatment plant and the pier were part of the same project, the inescapable conclusion is that Sullivan was also a harborworker. If Sullivan was assigned to work on the dock pier, he would be covered, however,

he would not be covered if he was assigned to work on the foundation for the sewage plant. The construction of the Act by the Benefits Review Board offends the thrust of the 1972 Amendments which were designed to eliminate bifurcated coverage.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the Judgment of the Second Circuit.

Respectfully submitted,

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Nos. 80-639 and 80-651

In the Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD SULLIVAN, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

RONALD FUSCO, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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* Other respondents in the court of appeals were the Hartford Accident & Indemnity Co. and the Director, Office of Workers' Compensation Programs, United States Department of Labor. See 33 U.S.C. 921a; Fed. R. App. P. 15(a); 20 C.F.R. 802.410(b). The Director also filed his own petition for review in the court of appeals. No. 79-4016 (2d Cir.). The court of appeals dismissed that petition for lack of standing (Pet. App. A-5, A-30 to A-31). The Director's petition for rehearing was denied on December 17, 1980.

QUESTION PRESENTED

Whether marine construction workers building a foundation for a sewage treatment plant on the Hudson River are persons "engaged in maritime employment," within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

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The original opinion of the court of appeals (Pet. App. A-9 to A-31)[1] is reported at 601 F.2d 659. The opinion of the court of appeals on remand (Pet. App. A-1 to A-7) is reported at 622 F.2d 1111. The opinion of the Benefits Review Board (Pet. App. A-36 to A-86) is reported at 9 B.R.B.S. 378. The decisions and orders of the administrative law judges (Pet. App. A-87 to A-95; A-96 to A-102) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1980. On August 19, 1980, the court of appeals denied a petition for rehearing filed by petitioner Sullivan. The petition for a writ of certiorari in No. 80-639 was filed on October 20, 1980. The petition in No. 80-651 was filed on October 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

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[1] "Pet. App." refers to the appendix to the petition in No. 80-651.

Section 3(a) of the Act, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this Act in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT

1. Petitioners, employees of respondent Perini North River Associates, were injured in separate job-related accidents at the site of the North River Pollution Control Project, a sewage treatment plant under construction on the Hudson River in New York City (Pet. App. A-11). Perini had contracted with the city to build the concrete substructure for the plant (*ibid.*).

The substructure extends approximately 700 feet from the shoreline into the Hudson River (Pet. App. A-11 to A-12) and runs along the length of the river for 2000 feet between West 133rd and West 148th Streets (*id.* at A-11, A-89). The construction contract required Perini to "place 2,300 hollow circular pipes, called caissons, in navigable waters down to imbedded rock, to fill the caissons with concrete, to connect them together at proper elevations above the water with concrete beams, and to place precast concrete slabs on top of the beams" (*id.* at A-12). The sewage treatment plant was to be constructed on this foundation under a separate contract for which bids were to be taken at a later date.

Petitioner Ronald Fusco was employed as a construction laborer (Pet. App. A-41). He "worked on floating stages and assisted the dock builders in the construction of the substructure" (*ibid.*). Fusco performed such tasks as "fetching materials from barges or from the shore, assisting in the driving of caissons into the river bed, pouring concrete into the caissons, fabricating wood forms for the pouring of concrete beams across the caissons and helping to construct platforms across those beams" (*id.* at A-89). He and his fellow employees frequently wore life jackets on the job because of the risk of falling into the river (*ibid.*).

On January 8, 1975, Fusco was injured in the course of his employment. As he descended a ladder that was leaning against a concrete form, the ladder twisted, throwing him against the form and causing him to fall (Pet. App. A-12, A-42, A-89; 80-651 Pet. 13-14). As Fusco fell from the ladder, he apparently struck the left side of his head against the side of the concrete form (*id.* at A-12, A-90). At the time of Fusco's injury, he was approximately 200 feet from shore.

Petitioner Bernard Sullivan was employed as a wire lather (Pet. App. A-41). In that capacity, he "performed a variety of tasks involving the steel reinforcement of the concrete beams and caissons for the substructure" (*ibid.*). In particular, Sullivan was "directly involved" in "the building and filling of caissons (large cylinders sunk upright into the water) into which steel re-enforcing rods were inserted before the caissons were filled with concrete" and in "re-enforcing horizontal beams hanging over the water from caisson to caisson" (*id.* at A-99). When they worked on these horizontal concrete beams

at high tide, Sullivan and other lathers were frequently standing in the water (*ibid.*). Two or three times a week, Sullivan and other lathers went aboard barges to unload steel rods or to prepare the rods to be moved by cranes aboard the barges (*ibid.*).

On September 11, 1975, Sullivan was injured in the course of his employment. He apparently sustained an injury to his lower back as he helped to pass a 30-foot steel rod into a connecting beam to reinforce it (80-639 Pet. 13). At the time of the accident, Sullivan was working "about 150 feet from the shore and was standing about 12 inches above the water" (Pet. App. A-99).

2. Petitioners filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Respondent Perini and its insurance carrier, respondent Hartford Accident & Indemnity Co., disputed the claims, asserting, *inter alia*, that the claimants were not "engaged in maritime employment," within the meaning of Section 2(3) of the Act, and were therefore not covered by the Act. The cases were referred to the Office of Administrative Law Judges for formal hearings. In separate proceedings, two administrative law judges reached opposite conclusions. One judge determined that Fusco was engaged in maritime employment and, on that basis, awarded compensation under the Act (Pet. App. A-87 to A-95). The other judge ruled that Sullivan was not engaged in maritime employment and, accordingly, rejected his claim (*id.* at A-96 to A-102).

In each case, the losing party appealed to the Benefits Review Board under 33 U.S.C. 921(b). The Board consolidated the appeals with the appeals in two other cases involving Perini employees. In a divided

decision (Pet. App. A-36 to A-86), the Board held that the claimants were not engaged in maritime employment because their construction jobs did not have "a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters" (*id.* at A-49). Departing from its own precedents,[2] the Board explicitly abandoned the proposition that, "if an employee was covered under the Act prior to the 1972 Amendments, the employee would similarly be covered after the amendments" (*id.* at A-51).

3. Petitioners and the Director, Office of Workers' Compensation Programs, sought judicial review of the Board's decision under 33 U.S.C. 921(c). The court of appeals reversed, holding that Fusco and Sullivan were covered by the Act (Pet. App. A-9 to A-31). The court concluded that petitioners would have been covered by the Act before the 1972 amendments and that Congress, when it amended the statute, did not intend to withdraw coverage from any workers previously covered. The court stated (Pet. App. A-22; emphasis in original):

> *Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility.*

The court also stated that it interpreted the statutory phrase "person engaged in maritime employment" to include "any person whose principal duties are performed on navigable waters as that term was under-

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[2] See, *e.g.*, *Stewart* v. *Brown & Root, Inc.*, 7 B.R.B.S. 356 (1978), aff'd, 607 F.2d 1087 (4th Cir. 1979), cert. denied, No. 79-1136 (June 2, 1980).

stood before 1972" (Pet. App. A-29). The opinion of the court of appeals thus intertwined two separate rationales in support of the conclusion that petitioners were "engaged in maritime employment" at the time of their injuries. The first focused on the place at which the injuries occurred, and the second concentrated on the location where petitioners' "principal duties" were performed. The geographic factor was predominant in both strains of the court's opinion.

In dictum, the court further concluded that this geographical focus is the *only* proper one under the Act and that the phrase "person[s] engaged in maritime employment" in Section 2(3) refers *only* to persons whose principal duties are performed on actual navigable waters or who are injured on such waters (Pet. App. A-29). The court believed that Congress listed longshoremen, harborworkers, ship repairmen, shipbuilders, and shipbreakers in Section 2(3), not as examples of persons engaged in maritime employment, but as additional persons covered by the Act whether or not engaged in maritime employment. The court clarified and emphasized this construction of Section 2(3) in another case decided the same day, *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670 (2d Cir. 1979), vacated and remanded, 446 U.S. 905 (1980), rev'd on remand, 624 F.2d 5.

Respondents Perini and Hartford petitioned for a writ of certiorari. Apparently because of the inconsistency between the court of appeals' interpretation of Section 2(3) and the subsequent decision of this Court in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), the Court vacated the judgment of the court of appeals and remanded for further consideration in light of *Ford*. See 444 U.S. 1028 (1980) (Pet. App. A-8).

On remand, the court of appeals reversed its original decision and held that Fusco and Sullivan were not engaged in maritime employment when they were injured because their activities did not "bear a significant relationship to navigation or to commerce on navigable waters" (Pet. App. A-4). The court explained (*id.* at A-5):

> In the cases at bar the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters. They were engaged exclusively in constructing a sewage disposal plant. * * * The only sense in which the claimants' activities were maritime was in the sense of their locus. To base a decision upon the locus of work is to found it upon a geographic concept—a foundation precluded by the reasoning in the Ford case.

DISCUSSION

The court of appeals' decision is incorrect for at least two, and probably three, reasons. Moreover, at least some of the legal issues implicated in the decision below are sufficiently important to merit the attention of this Court. Nevertheless, for a variety of reasons, we believe that this case does not present an appropriate occasion for the Court to undertake review of the significant unresolved questions raised under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972.

1. The first, and perhaps most egregious, error of the court of appeals is its rejection of the proposition that an employee whose principal duties are performed over the actual navigable waters of the United States is, by virtue of that fact alone, "engaged in maritime employment" within the mean-

ing of Section 2(3) of the amended Act. Although, as we discuss at pages 18-19, *infra*, the record leaves some uncertainty regarding petitioners' precise location at the time they were injured, there appears to be no dispute that the court of appeals was correct in its initial opinion when it observed that each petitioner "performed his principal duties upon navigable waters as that term was defined in § 3(a) of the original 1927 LHWCA" (Pet. App. A-30).

We submit that any employee who performs his principal duties over actual navigable waters (*i.e.*, "wet waters" or "pre-1972 waters") is, for that reason alone, "engaged in maritime employment" under Section 2(3) of the amended Act and thus satisfies the so-called "status" test for coverage under the Act.[3] The explanation for this view is essentially the same as the explanation for the original enactment of the statute in 1927.

In *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), this Court held that the states could not constitutionally apply their workmen's compensation remedies to maritime injuries occurring on the navigable waters of the United States. Subsequently, the Court invalidated congressional efforts to delegate to the states the necessary authority to provide compensation for such injuries. *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219 (1924). In response to these decisions, Congress enacted the LHWCA to provide a federal compensation remedy for injured

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[3] Coverage under the Act is, of course, subject to the statutory exclusions in Section 2(3) for "a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

marine workers arguably excluded from state coverage by *Jensen*. See generally *Sun Ship, Inc.* v. *Pennsylvania*, No. 79-343 (June 23, 1980), slip op. 2-4.

Persons who perform their principal duties over actual navigable waters are precisely the kind of employees Congress had in mind when it enacted the LHWCA. They were the persons who most needed the protection of a federal compensation remedy because most of their work was performed at a place that, under *Jensen*, could not be reached by state workmen's compensation laws.

The court of appeals recognized this fact in its initial opinion but concluded on remand that the geographical component of the phrase "maritime employment" had been abandoned by this Court in *P. C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979). Under what it perceived to be the compulsion of *Ford*, the court of appeals ruled that even a person whose principal duties are performed on navigable waters is nevertheless not necessarily "engaged in maritime employment" under Section 2(3) of the amended Act. *Ford* does not support that proposition, and nothing in this Court's opinion was intended to withdraw from the category of maritime employees any persons who spend the bulk of their working day working on actual navigable waters.

The claimants in *Ford* were not such workers. Their work was not performed on actual navigable waters. Indeed, the question before the Court in *Ford* was whether land-based cargo handlers could be "engaged in maritime employment," and therefore covered under the Act, even if they were not subject to assignment aboard a vessel in the course of their working day. The question, in short, was whether workers could be engaged in maritime employment

even if they never worked on actual navigable waters. In this context, the Court emphasized that the phrase "maritime employment," as used in Section 2(3), has an occupational content and does not focus exclusively on the locus of a person's workday activities. 444 U.S. at 78-81. The Court therefore held that two marine terminal workers engaged in the process of transferring cargo between sea and land transportation were engaged in maritime employment by the very nature of their work, even if they were never required to perform any tasks on actual navigable waters. The Court reached this result in part because Congress specified in Section 2(3) that the phrase "person engaged in maritime employment" includes "any longshoreman or other person engaged in longshoring operations * * *."

The Court never suggested, however, that the location of a person's work is irrelevant to the question whether he is "engaged in maritime employment" or that a person who routinely performs duties on actual navigable waters is not "engaged in maritime employment" unless his work "bear[s] a significant relationship to navigation or to commerce on navigable waters." The Court in *Ford* had no occasion to address such matters because they were not germane to the claimants whose coverage under the Act was then in dispute.

The fact is that the phrase "maritime employment," as used in Section 2(3), has *both* an occupational and a geographic content. The court's decision in *Ford* was not intended to exclude the latter in favor of the former. By requiring a "significant relationship to navigation or to commerce on navigable waters" as a precondition to coverage under the Act, even for employees whose principal duties are per-

formed on actual navigable waters, the court of appeals has adopted a test that in many instances will re-create the very problem the LHWCA was initially intended to solve, *i.e.*, the potential unavailability of *any* compensation remedy for persons injured on the navigable waters of the United States.

We regard this error in the court of appeals' decision as an important one and believe that intervention by this Court may well be necessary to rectify it. For two reasons, however, we think that review is not warranted in the present case. In the first place, no conflict has yet arisen among the circuits concerning the maritime employment question here presented. We have been advised by the Department of Labor that numerous cases involving marine construction workers are currently being litigated before the Benefits Review Board and in the several deep-water circuits. In part because of the significant factual variation that inevitably characterizes cases under the Act, it seems prudent at this juncture to await further developments in the courts of appeals. Such a course will not only permit this Court to have the benefit of additional views on the question of the proper geographic scope of Section 2(3), but it will also assist the Court in selecting a typical case for review.

Deferral of review seems particularly appropriate in the present circumstances because the interpretation of "maritime employment" described in the preceding paragraphs was apparently not briefed or argued by any of the parties before it was adopted by the court of appeals in its initial opinion in this case. (That opinion was flawed, however, by its insistence that "maritime employment" under Section 2(3) can *only* be understood in a geographical

sense.) On remand, the parties filed supplemental briefs that alluded to the rationale of the court's initial decision but did not separately develop the view that a person who regularly performs duties on navigable waters is, by virtue of that fact alone, engaged in maritime employment. Although a reasonably prompt, definitive resolution of the question is desirable, we believe the Court's consideration of the matter will be aided by a court of appeals' decision rendered after briefing and argument that focuses separately on the significance of the place where the bulk of an employee's duties are performed, on the one hand, and the place where he is injured, on the other.

2. The second deficiency in the court of appeals' decision on remand is its unexplained dismissal of the nature of the project on which petitioners were working as a factor in determining whether they were engaged in maritime employment at the time of their injuries. The court offered only the following conclusory statement (Pet. App. A-5): "It is not significant that the [sewage disposal] plant was being constructed so that sewage would not cause pollution of navigable waters * * *." The court did not say why the purpose of the project was insignificant, and we believe that the court's assertion to that effect is erroneous.

Even if "maritime employment" under Section 2 (3) requires a "relationship to navigation or to commerce on navigable waters," as the court of appeals held, that relationship is present here because of the nature of the plant that petitioners were helping to build. The primary purpose of the sewage disposal plant was to prevent pollution of the Hudson River and thereby to contribute to navigation and commerce

on that waterway. Whatever may be the correct rule with respect to marine construction workers generally, the court of appeals should have found that petitioners satisfied the status test in Section 2(3).

Although the court of appeals' failure to attribute any significance to the nature of the construction project was error, this aspect of the case is not sufficiently important to merit review by this Court. Marine workers injured in the construction of sewage disposal plants represent only a small percentage of the workers entitled to coverage under the Act, and their number also is not large in absolute terms. The Benefits Review Board and the courts of appeals have agreed that construction workers employed on projects bearing a more conventional relationship to navigation and commerce are covered under the Act. See, *e.g.*, *Stewart* v. *Brown & Root, Inc.*, 7 B.R.B.S. 356 (1978), aff'd, 607 F.2d 1087 (4th Cir. 1979), cert. denied, No. 79-1136 (June 2, 1980). Considered by itself, the propriety of extending this rule to sewage disposal plants is not sufficiently significant to the proper administration of the Act to warrant this Court's intervention.

3. The court of appeals' decision is probably incorrect in a third respect, but certain deficiencies in the record make it difficult or impossible to be sure. It appears likely that petitioners were injured while working on the actual navigable waters of the United States. The court of appeals acknowledged in its initial opinion that, if this were so, petitioners would have been covered under the Act before 1972, solely by virtue of the place at which their injuries occurred and irrespective of the location where their principal duties were performed (Pet. App. A-18 to A-21). The consequence of the court of appeals' de-

cision on remand is that employees who the court apparently assumed would have been covered before 1972 are held not to be covered under the amended Act. In our view, this reflects a misconception of the nature and intent of the 1972 amendments. Congress acted in 1972 to expand the Act's coverage, not to expand it in some areas and contract it in others.

The question whether the 1972 amendments removed coverage under the Act from any employee covered before 1972 is an important one that the Court has already recognized (*Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 n.25 (1977)) and that will probably require resolution in this forum. Because the record does not definitively establish petitioners' location at the time of their injuries, however, we believe that the Court should postpone its consideration of the question until a case arises in which there can be no dispute concerning the injured employee's eligibility for benefits under the pre-1972 Act.

Before 1972, the general rule under the Act was that persons injured on the actual navigable waters of the United States were covered and persons injured on land were not. See *Sun Ship, Inc.* v. *Pennsylvania, supra*; *P. C. Pfeiffer Co.* v. *Ford, supra*, 444 U.S. at 72-73; *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969); *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962); *Davis* v. *Department of Labor*, 317 U.S. 249 (1942); *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244, 247 (1941). In particular, marine construction workers were covered, as long as they were injured on navigable waters. This was true regardless of whether the project under construction was intended to aid navigation or commerce on navigable waters. Compare *Travelers*

Insurance Co. v. *Branham*, 136 F.2d 873 (4th Cir. 1943) (labor foreman building dry dock), with *Hardaway Contracting Co.* v. *O'Keeffe*, 414 F.2d 657 (5th Cir. 1968) (laborer building bridge).

The legislative history of the 1972 amendments demonstrates that Congress did not wish to exclude from coverage any employees who are injured on actual navigable waters and therefore would have been covered under the original Act. The amendments to Section 2(3) of the Act, defining "employee," and to Section 3(a), the general coverage provision, were discussed in both the Senate and House committee reports under the heading: "Extension of Coverage to Shoreside Areas." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972). In its section-by-section analysis of the statutory changes, the Senate committee stated:

> [Amended § 2(3)] specifically includes any longshoreman or other person engaged in longshoreing [*sic*] operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. *It does not exclude other employees traditionally covered* * * *.

S. Rep. No. 92-1125, *supra*, at 16 (emphasis added).

In its original opinion, the court of appeals acknowledged this clear statement of legislative intent and held that the italicized sentence from the committee report means that employees previously covered by the Act remain covered under the amended version of the statute. In the court's words (Pet. App. A-22; emphasis in original):

> *Congress took it for granted that injuries occurring upon water were covered and would*

remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility. What concerned Congress was injuries on land.

On remand from this Court, after the decision in *P.C. Pfeiffer Co.* v. *Ford, supra,* however, the court of appeals concluded that the location of an injury, by itself, can no longer be dispositive of the coverage question under the Act. As already discussed (see page 6, *supra*), the court interpreted *Ford* to adopt an exclusively occupational standard for determining whether a particular injured worker is entitled to the Act's benefits. As a consequence, the court held that not all workers injured on the actual navigable waters of the United States remain covered under the amended Act. Congress' revised definition of "employee" in Section 2(3), the court thought, provides coverage only for those workers whose activities "bear a significant relationship to navigation or to commerce on navigable waters" (Pet. App. A-4).

This interpretation of the amended Act by the court of appeals resurrects the distinction, rejected under the original statute in *Calbeck* v. *Travelers Insurance Co., supra,* between jobs of purely local concern and jobs related to navigation and commerce. There is no evidence that Congress intended such a result when it amended the statute in 1972. Nor is this outcome required by the Court's decisions in *Ford* and in *Northeast Marine Terminal Co.* v. *Caputo, supra.* Those cases dealt with employees falling squarely within the area of Congress' special concern in 1972. The employees suffered injuries on land, which before the amendments would not have been covered because of the location of their occurrence. Congress' primary purpose in 1972 was to eliminate the locus of injury as the single coverage-

determining factor for employees engaged in certain occupations. But Congress never said that, for employees whose jobs are not included among the occupations specifically enumerated in Section 2(3), the occurrence of an injury on actual navigable waters is irrelevant to the determination whether the employee was "engaged in maritime employment" when he was injured. On the contrary, Congress did not seek to change this aspect of pre-1972 law, and the Court in *Caputo* explicitly emphasized that that case did not "involve the question whether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined." 432 U.S. at 265 n.25.

The erroneous reasoning adopted by the court of appeals and the Benefits Review Board in this case is causing substantial difficulties and uncertainty in marine construction coverage cases now coming before the Board. In reliance on the Board's decision here, coverage has been denied in cases involving commercial divers constructing underwater sewer pipelines,[4] a dredge deckhand on an airport reef runway construction project,[5] a bridge construction worker unloading pilings from a barge,[6] and a num-

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[4] *Hobbs* v. *Healy Tibbits Construction Co.*, Case No. 78-LHCA-1040-S, OWCP No. 15-15067 (Mar. 5, 1980), appeals docketed, BRB Nos. 80-390 and 80-390A; *Brown* v. *Hydro-Dredge Corp.*, Case No. 79-LHCA-1162, OWCP No. 1-31154 (Nov. 20, 1979), appeals docketed, BRB Nos. 79-721 and 79-721A.

[5] *Ramos* v. *Universal Dredging Corp.*, 10 B.R.B.S. 368 (1979), appeals docketed, Nos. 79-7257, 79-7258 and 79-7302 (9th Cir. June 25 and July 2, 1979).

[6] *Gilliam* v. *Wiley N. Jackson Co.*, 12 B.R.B.S. 556 (1980), appeal docketed, No. 80-5804 (5th Cir. Oct. 9, 1980).

ber of other workers injured on navigable waters who would have been covered before 1972. Accordingly, the Director regards review by this Court as essential in the first suitable case. For the following reasons, however, we do not believe that this case is an appropriate one in which to attempt to resolve the important legal question.

Before 1972, coverage determinations under the Act focused on one principal question: did the injury occur on the navigable waters of the United States within the meaning of the statute. The courts developed a considerable body of law concerning the areas that were deemed to be navigable waters for purposes of the Act. It was well-settled at the time the piers and docks and other structures permanently affixed to the land were not considered to be navigable waters, even if they in fact extended far into the water. See *Nacirema Operating Co.* v. *Johnson, supra,* 396 U.S. at 214-215.

The problem in the present case is that the record does not sufficiently establish that either Fusco or Sullivan would have been covered under the pre-1972 Act. In both cases, there appears to be some possibility that the injury occurred on a part of the concrete substructure for the sewage treatment plant that was already permanently affixed to the land. In Fusco's case, the administrative law judge indicated that the ladder on which the claimant was injured led "from one of the concrete forms down to a raft below" (Pet. App. A-89). On this basis, pre-1972 coverage would seem fairly clear, assuming the raft was floating in the water. The ladder was not permanently affixed to the land, and the injury took place over water. But Fusco himself now says (80-651 Pet. 13-14) that the ladder extended from the

top of the grillage above the concrete forms down into a particular form. This suggests the possibility that the claimant was injured at a place permanently affixed to the land, a place that would therefore not qualify as navigable waters under pre-1972 law.[7]

As for Sullivan, the record is even less enlightening. As the court of appeals accurately observed in its initial opinion (Pet. App. A-15), the record does not reveal exactly where Sullivan was standing when he was injured. The court of appeals bypassed this possible problem by simply stating: "We therefore cannot suppose that at the time of the accident, while installing beams hanging over water, Sullivan was standing on a structure permanently affixed to land" (*id.* at A-16). The difficulty, of course, is that there also does not seem to be any particular reason for supposing that Sullivan was not standing on such a structure.[8]

In light of the apparent inadequacy of the present record squarely to present the important legal question concerning the effect of the 1972 amendments on pre-1972 coverage, we do not urge the Court to grant these petitions. Especially in view of the abundance of claims filed under this statute, we think it more prudent to await a case that will, with greater certainty, permit resolution of the matter that deserves this Court's attention.

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[7] Fusco's petition also raises a substantial timeliness problem. See Perini Br. in Opp. 3-10.

[8] The Court may wish to vacate the decision below and remand for further fact findings on this point.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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